Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

JAMES G. SNEAD,
Petitioner,

VS.

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court, in ruling on a claim under an ERISA disability policy that reduces benefits by "amounts payable under any Workman's Compensation Law", is bound by state law as to the amount of workers' compensation paid.

2. Whether a federal court in such a case can permissably determine that payments by third parties to settle a tort action were workers' compensation that reduced disability benefits when, under state law, workers' compensation is a statutory remedy only available from employers or their insurers.

3. Whether a federal court in such a case can permissably determine that a disabled employee received $163,000 in workers' compensation after the state Workers' Compensation Commission has determined that the employee received $39,236.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in Appendix A hereto. The opinion of the District Court is reported at 824 F.Supp. 69 (E.D.Va. 1993), and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 12, 1994. A Petition for rehearing was timely filed and was denied on January 10, 1995 (Appendix C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Snead's right forearm was crushed in an industrial accident on June 26, 1987, as a result of which his right arm and hand were rendered useless. After his accident he received $326 per week ($1,412 per month) in workers' compensation payments from Fireman's Fund, his employer's insurer. He also received a monthly benefit under a long term disability policy paid for by his employer and issued by Respondent UNUM, the country's largest group disability insurer. The policy provided that monthly benefits would be reduced by "any amount payable under any Workers' Compensation Law", and the full disability benefit of $2,761 was reduced by $1,412.

Snead also filed suit against the third-party tortfeasors responsible for his accident. That suit was settled August 31, 1989 for $700,000 which, after fees and expenses, produced a net recovery of $410,000. As part of the settlement Snead was required to pay back to Fireman's Fund from the gross recovery all of the compensation payments it had made ($39,236) plus some medical expenses, pursuant to an Agreed Statement of Fact and Award of the Industrial Commission of Virginia which specified "total compensation paid $39,236.85" and that "Mr. Snead received $410,000 from the third party carrier. No further compensation payments will be made until claimant has exhausted the net proceeds of the settlement at the rate of $326." Since Virginia workers' compensation law limits the payment of compensation to a maximum of 500 weeks ($163,000), it was mathematically impossible for Snead to receive compensation after August 31, 1989. The Commission's outstanding award in favor of Snead was terminated effective August 31, 1989. Under Virginia law, compensation is payable under an outstanding award but not under a terminated award.

UNUM's policy did not reduce benefits for amounts recovered in tort actions.

UNUM subsequently decided that Snead was not disabled and terminated disability benefits, and Snead brought this ERISA action in the Eastern District of Virginia pursuant to 29 USC § 1132(e)(1). Shortly before trial, UNUM conceded that Snead was disabled but claimed that, as a result of the tort settlement, Snead had received $163,000 in workers' compensation which reduced disability benefits.

The District Court agreed, holding that the third-party tortfeasors (persons not subject to the Virginia Workers' Compensation Act) paid $163,000 in workers' compensation to Snead when they settled his tort suit for a net recovery of $410,000, and allowed UNUM to reduce Snead's ERISA disability benefits by $163,000. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT'S DECISION THAT SNEAD RECEIVED $163,000 IN WORKERS' COMPENSATION IS CONTRARY TO THE VIRGINIA WORKERS' COMPENSATION COMMISSION DETERMINATION THAT HE RECEIVED $39,236.

The Fourth Circuit held that Snead was paid $163,000 in workers' compensation by the third parties when he settled his tort action. However, the Industrial Commission of Virginia (now the Virginia Workers' Compensation Commission), had earlier determined that the total compensation paid to Snead was $39,236 and had terminated the outstanding award in favor of Snead effective August 31, 1989. The Commission's records are conveniently summarized in its "pink sheet" (Appendix D, p.32a).

The Fourth Circuit reasoned that Fireman's Fund "was relieved from liability for any future benefit payments", and that therefore Snead received one full payment[1] of workers' compensation benefits, and — even though he had reimbursed Fireman's Fund for all worker's compensation received — he "should not be allowed to recover twice for the same loss".[2] Opinion, p.10a. This reasoning, which unfairly charges Snead with getting compensation that he never got and keeping compensation that he repaid, approved UNUM's reduction of disability benefits — not for workers' compensation that Fireman's Fund paid — but for compensation that Fireman's Fund did *not* pay.[3]

While the Opinion refers to *Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108, 110-111 (1st Cir. 1988), that case does not even remotely suggest that payments by third parties can be workers' compensation.

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[1]Although used in the decision below, "one full payment" has never appeared in any reported Virginia compensation case. Two such cases have referred to "one full recovery", but only to emphasize that an employee may recover compensation or damages but not both. *Fauver v. Bell*, infra at 7; *Noblin v. Randolph Corp.* 23 S.E.2d 209 (Va. 1942). No case has ever equated the recovery of damages with the recovery of compensation.

[2]The decisions below inexplicably chose to ignore the undisputed evidence that Snead, at the time of the tort settlement, repaid $39,230 to Fireman's Fund and thus did not keep both compensation and damages.

[3]Two universal principles of compensation law are basic to this discussion:

a) If a worker recovers compensation and then damages, he must repay the compensation to the extent of the damages recovered; he cannot keep both.

b) If a worker recovers damages, he is barred from recovering compensation, to the extent of the damages recovered.

II.

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION THAT THE STATE DETERMINATION OF THE AMOUNT OF WORKERS' COMPENSATION IS BINDING ON A FEDERAL COURT IN AN ERISA BENEFITS CASE.

Both the Fifth and Ninth Circuits have held that state determinations of workers' compensation issues are controlling in ERISA cases.

In *Nesom v. Brown and Root, USA, Inc.*, 982 F.2d 1188 (5th Cir. 1992), in dealing with a UNUM disability policy that also reduced benefits for workers' compensation amounts, the court held that although the termination of ERISA policy benefits was a question of federal law, the amount of workers' compensation for which the insured was eligible was a question of state law and the state determination "could not be changed by a federal court." Id. at 1192.

The Ninth Circuit has held to the same effect in *Losada v. Golden Gate Disposal Co.*, 950 F.2d 1395 (9th Cir. 1991). There, an ERISA administrator sought to reduce pension benefits by a workers' compensation settlement for permanent disability. The Court analyzed ERISA preemption of state law and held that "California laws determining the character of Losada's settlement award do not fall within the preemptive scope of ERISA", Id. at 1401, and that, in the Ninth Circuit, a determination of the character of the compensation benefits under state law is required in order to determine ERISA plan benefits. The Ninth Circuit noted the conflict between the circuits in its comment that "the Fourth and Sixth Circuits have approved integration of all workers' compensation payments, regardless of the character of the benefits under state law. (citations)". Id. at 1400.

In the subject case both the Fourth Circuit and the District Court, in ruling that $163,000 in workers' compensation had been paid by the third party tortfeasors, ignored the Virginia Commission's determination that $39,236 was the amount of workers' compensation paid.

While the requirement of a uniform federal ERISA law is well-settled, there is no uniform workers' compensation law because benefits are solely governed by differing state laws. Accordingly, contrary to the decision below, a federal court in an ERISA case should be bound by the state determination of workers' compensation issues and the state law that determines those issues.

III.

THE FOURTH CIRCUIT'S UNPRECEDENTED HOLDING THAT THE TORT ACTION DEFENDANTS PAID SNEAD WORKERS' COMPENSATION IS A SIGNIFICANT DEPARTURE FROM ESTABLISHED WORKERS' COMPENSATION LAW AND EFFECTIVELY REWRITES ALL ERISA DISABILITY POLICIES TO REDUCE BENEFITS WHEN THERE IS A TORT ACTION RECOVERY.

Snead was only entitled to keep one recovery; since he got damages, he had to return all compensation and the compensation insurer was relieved of liability for further payments. *Sheris v. Traveler's Insurance Company,* 491 F.2d 603, 605 (4th Cir. 1974). And since UNUM's policy allowed benefit reduction for compensation but not for damages, the only question was what did Snead get when he was paid $410,000, and that should have been conclusively determined by who paid it (a compensation insurer pays compensation; a tort defendant pays damages). As all of the $410,000 was paid by the tort action defendants, the settlement amount was by definition damages, and not compensation.

Virginia law is clear: the Workers' Compensation Act applies only to an industrially injured employee on the one hand and the employer and its compensation carrier on the other, *Fauver v. Bell,* 65 S.E.2d 575 (Va. S. Ct. 1951). A third party is not subject to, and cannot be required to make payments under, the Workers' Compensation Act. *Mann v. City of Lynchburg,* 106 S.E. 371 (Va. S. Ct. 1921); *McKay v. Citizens Rapid Transit Co.,* 59 S.E.2d 121, 123 (Va. S. Ct. 1956) ("where an employee is injured by a third party, such third party is in no way liable to the employee under the Workmen's Compensation Act; . . . his liability is merely that of a tort-feasor").

The obvious point that civil damages are not workers' compensation was recently made by the California Supreme Court in *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*, 9 Cal. 4th 27, 43 (1994):

> "the award of [workers' compensation] benefits is within the exclusive jurisdiction of the WCAB . . . . Thus, a civil suit for damages is no more a claim for workers' compensation benefits than a criminal or disciplinary action is a civil suit for damages. (citations)."

Virginia law is the same. See, *Dillard v. Industrial Commission of Virginia,* 416 U.S. 783 (1974). No other case — state or federal, in any jurisdiction — has ever held that payment by persons not subject to a Workers' Compensation Act was compensation, let alone compensation that reduced ERISA benefits.

The Fourth Circuit affirmed a published District Court opinion that is a significant departure from basic and settled workers' compensation law and charges an ERISA claimant, because he settled a tort action, with getting compensation that was never received. This opinion is of great importance not only to employees covered under disability policies written by UNUM, but to all employees covered by

disability policies who are injured on the job by third parties, as the opinion effectively rewrites ERISA disability policies to provide for benefit reduction in the event of a tort recovery, thereby greatly reducing the exposure of insurers such as UNUM at the expense of disabled employees.

In sanctioning this rewriting, the Fourth Circuit ignored its own admonition that doing so is not a permissable undertaking in an ERISA case. "The judicial role is not to rewrite plan provisions, but to assure that they are fairly administered." *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1078 (4th Cir. 1989).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Opinion of the United States Court of Appeals for the Fourth Circuit.

Dated: March 1, 1995.

Respectfully submitted,

WALTER M. SCHEY
Counsel for Petitioner

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES G. SNEAD, *Plaintiff-Appellant,* v. UNUM LIFE INSURANCE COMPANY OF AMERICA, *Defendant-Appellee.*	No. 93-1857
JAMES G. SNEAD, *Plaintiff-Appellee,* v. UNUM LIFE INSURANCE COMPANY OF AMERICA, *Defendant-Appellant.*	No. 93-1944

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief District Judge.
(CA-92-542-A)

Argued: April 14, 1994

Decided: September 12, 1994

Before ERVIN, Chief Judge, SPROUSE, Senior Circuit Judge, and HARVEY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part and remanded in part by unpublished per curiam opinion.

COUNSEL

ARGUED: Walter Martin Schey, San Francisco, California, for Appellant. James Lawry Nolan, LEBOEUF, LAMB, GREENE & MACRAE, Washington, D.C., for Appellee. **ON BRIEF:** Andrew J. Bernstein, UNUM LIFE INSURANCE COMPANY OF AMERICA, Portland, Maine, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This appeal involves the proper calculation of benefits under a group long term disability policy, which was part of an ERISA plan covering appellant James G. Snead ("Snead"). Monthly benefits are calculated on the basis of an employee's earnings prior to disability, with reductions for duplicative income replacement benefits from other sources such as workers' compensation, Social Security and retirement benefits. The issues tried below involved the calculation of Snead's benefits, the applicability of workers' compensation deductions in light of a related tort settlement, and whether Snead was required to submit medical proof of his continued disability at his cost.

The district court held that UNUM Life Insurance Company of America ("UNUM") is entitled to offset workers' compensation benefits paid to Snead by a third party against UNUM's disability payments to Snead, that Snead must periodically submit to a physical exam at his own expense, and that Snead is entitled to recover his attorneys' fees and costs. We affirm the district court's decision with respect to the amount of disability benefits payable to Snead and the award to Snead of attorney's fees and costs. However, we

remand on the issue of whether Snead must pay for future physical exams when these are required by UNUM.

I.

Snead was employed by American Pecco Corporation ("American Pecco") as a serviceman on a construction hoist on June 27, 1987, when his right arm and hand were permanently injured as a result of a workplace accident. Snead was insured against long term disability under an employee welfare plan (the "Policy") purchased from UNUM by American Pecco. The Policy is governed by ERISA, 29 U.S.C. §§1001 *et seq.* When injured, Snead was also entitled to receive workers' compensation benefits from Fireman's Fund Insurance Company ("Fireman's Fund"), American Pecco's workers' compensation carrier.

On June 28, 1987, Fireman's Fund began paying Snead workers' compensation benefits in the amount of $326 per week based on Snead's average pre-injury wage of $732 a week. On September 10, 1987, Snead applied to UNUM for disability benefits. Snead's application was approved, and he received benefits covering the period from September 26, 1987 through September 26, 1989. Pursuant to the terms of the Policy, UNUM was entitled to deduct Snead's workers' compensation payments from the long-term disability payments:

> Monthly Benefit Reduction: If the Insured Employee is entitled to other income benefits, as defined below, for the same period of disability for which a Monthly Benefit is payable in accordance with the terms of this Policy, then the amount of such Monthly Benefit which is payable hereunder shall be reduced by the amount of these other benefits.

Other income benefits, referred to above, include:

> (1) any amount payable under any Workmen's Compensation Law, Occupational Disease Law, or any other legislation of similar purpose . . . .

Thus, UNUM deducted $326 from Snead's weekly long-term disability payments during this period. Under the Policy, these deductions were to continue for as long as Snead was entitled to receive workers' compensation benefits, which is a maximum of 500 weeks under Virginia law. VA. Code Ann. § 65.2-500(D) (Michie 1991).

Snead subsequently brought a third-party action against HCB Contractors, Inc. for its role in the accident, *Snead v. HCB Contractors, Inc. et al.*, No. K87-2022 (D. Md. 1987). In August 1989, that suit was settled for $700,000. Snead received $410,000 in cash from the settlement after paying medical expenses, fees and costs. One of those costs was a $50,000 payment to Fireman's Fund to satisfy a workers' compensation lien. Due to Fireman Fund's statutory right of subrogation, Snead could not receive any workers' compensation payments so long as the tort settlement exceeded the amount due Snead under the workers' compensation rules.[1]

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[1] Under Virginia law, a claim against an employer for injury or death benefits

> shall operate as an assignment to the employer of any right to recover damages which the insured employee . . . may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce . . . the legal liability of such other party.

Va. Code Ann. § 65.2-309 (Michie 1991). In discussing Virginia's subrogation provision, the Fourth Circuit has stated that

> [t]he express inclusion of the subrogation provision in Workmen's Compensation Acts prevents the employee from acquiring for a single injury two separate remedies — the one, in tort, against the third party tort-feasor, the other, in contract, under the Workmen's

Snead and Fireman's Fund reached an agreement under which Snead would pay Fireman's Fund $50,000 to satisfy the workers' compensation lien, and Fireman's Fund would pay for his medical benefits for five years. Fireman's Fund and Snead filed an agreed statement of facts with the Workmen's Compensation Industrial Commission of Virginia on September 25, 1989, stating that $39,236.85 of the $50,000 represented repayment to Fireman's Fund for workers' compensation benefits received by Snead between the date of the accident and the date of settlement of the suit against HCB Contractors.

In September 1989, Snead returned to work at American Pecco in a different position at considerably lower pay. While Snead was no longer entitled to payment of full disability benefits, he did receive smaller benefit payments under the Policy's Rehabilitative Benefits provision. UNUM did not deduct $326 from Snead's weekly payments during this period. Snead was laid off from his new position on June 17, 1991. After he was laid off by American Pecco, Snead filed another claim for full disability benefits with UNUM. In November 1991, UNUM determined that he did not qualify as totally disabled from "any gainful occupation" and refused to provide further benefits after November 26, 1991.

On December 5, 1991, Snead's attorney wrote to UNUM requesting an ERISA review of its decision to deny benefits. UNUM claims that it asked Snead to provide information about his disability, rehabilitation prospects, and earning

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> Compensation Act; for it is quite generally held that, in the absence of such an express statutory grant to the employer, the employee retains the right to collect full damages from the third party tortfeasor, in addition to his right to collect compensation under the Act.

Crab Orchard Improvement Co. v. Chesapeake & Ohio Ry. Co. 115 F.2d 277, 279 (4th Cir. 1940), *cert. denied.* 312 U.S. 702 (1941).

capacity, but that Snead failed to provide this information. In January 1992, UNUM again made a determination that Snead was able to work in another gainful occupation and that he was no longer totally disabled under the terms of the Policy.

On April 17, 1992, Snead brought this suit in federal district court under ERISA, 29 U.S.C. §§ 1132(a)(1)(B) and 1451, to enforce his rights under the plan. UNUM filed a motion for summary judgment on July 29, 1992, which argued that Snead was not totally disabled. UNUM subsequently withdrew that argument; it states that this withdrawal was based on documents that it received under a federal magistrate judge's order compelling Snead to produce documents relating to his tort suit against HCB Contractors. UNUM asserts that these documents demonstrated that Snead was indeed totally disabled and that therefore UNUM reopened its administrative review. On August 28, 1992, the district court ordered a remand to the UNUM plan administrator. After review by the plan administrator, UNUM determined that Snead's disability payments should be reinstated, retroactive to November 27, 1991, the date on which UNUM initially rejected Snead's claim for long-term disability.

The parties returned to court, however, over the amount to which Snead was entitled. UNUM claimed that it was entitled to deduct from Snead's future disability payments the $326 weekly workers' compensation benefits to which he was entitled. UNUM further claimed that it had overpaid benefits to Snead because it had not reduced the disability benefits it paid during Snead's reemployment in 1989-91 and pending its determination of his 1991 total disability claim by the amount of workers' compensation benefits that Fireman's Fund paid to Snead during that same time period. Snead argued, in contrast, that as a result of his $700,000 settlement with HCB Contractors and Virginia's rule on

subrogation, he was no longer entitled to workers' compensation benefits because, under its right of subrogation, Fireman's Fund would only have to resume payment to Snead if his settlement payment, divided into weekly amounts of $326, would run out before the 500-week Virginia statutory maximum period for workers' compensation. In Snead's case, however, his tort settlement will outlast the 500-week maximum, and Fireman's Fund will never have to pay him benefits. The parties also disputed whether Snead was required to submit and pay for medical proof of his continued total disability.

The district court ruled in UNUM's favor and found that UNUM could deduct $326 per week for workers' compensation benefits over the remainder of the 500 weeks. The court rejected Snead's claim that UNUM had been unjustly enriched by deducting $326 per week for payments made during the period prior to the tort settlement because Snead had repaid the amounts on which the deductions were premised to Fireman's Fund as part of the $50,000 workers' compensation lien. The district court also ruled that Snead was responsible for paying for future medical examinations to confirm his continuing disability status. Finally, the court awarded Snead attorneys' fees and costs, finding that he was a prevailing party based on the finding that he was totally disabled.

Snead timely appealed the court's determination as to the deductions for workers' compensation payments and his responsibility to pay for medical examinations. UNUM cross-appealed the district court's award of attorneys' fees to Snead.

II.

In reviewing the issue of whether UNUM's Policy permits UNUM to offset the proceeds of the tort settlement against its payments to Snead, it is instructive to begin by

examining the effect of the tort settlement. Snead views the settlement as having relieved Fireman's Fund of the obligation to pay any of the $163,000 (i.e. $326 x 500 weeks) in workers' compensation benefits to which Snead would have been entitled in the absence of the settlement agreement. Therefore, Snead claims that he is not, and will never be, entitled to payment from Fireman's Fund, and that UNUM thus has no right to reduce his disability payments. He further contends that he is now owed the amount of the reductions taken for workers' compensation during the period of September 26, 1987 through September 26, 1989, because Firemen's Fund recouped its payments from Snead following the settlement of Snead's third-party suit. UNUM, on the other hand, maintains that Snead has received the equivalent of his full workers' compensation recovery in a lump sum. Therefore, the workers' compensation reduction should continue for 500 weeks, the maximum allowable under Virginia law.

In addressing this issue, the district court was guided by the First Circuit's decision in *Sampson v. Mutual Ben. Life Ins. Co.*, 863 F.2d 108 (1st Cir. 1988), which is the only opinion that addresses this issue. *Sampson* holds that, in an ERISA case such as Snead's, an employee may not recover monies withheld by a disability insurance carrier to offset workers' compensation payments even after the workers' compensation insurer has recovered all of its payments from the settlement in the employee's action against a third-party tort-feasor. The First Circuit held that

> to allow Sampson to recover the loss-of-time offset from Mutual would violate the principle underlying both the Mutual policy's offset provision and the reimbursement provisions of the Massachusetts workers' compensation law, for it would allow Sampson to recover twice for the same loss.

863 F.2d at 110-11. Even though *Sampson* did not involve deductions for future workers' compensation payments obviated by a settlement, the district court nonetheless followed the reasoning of *Sampson* and found that UNUM's Policy allowed it to offset all of Fireman's Fund's potential liability:

> the plain language of the policy provision permits the insurance company to offset disability benefits against workmen's compensation benefits previously paid to the disabled employee. Thus, UNUM is entitled to offset workmen's compensation benefits paid to Snead by Fireman's Fund against disability payments UNUM must pay to Snead.

J.A. at 447. In the instant case, Fireman's Fund received reimbursement from Snead for workers' compensation disability payments it had already paid on account of his $700,000 third-party settlement. Fireman's Fund also received credit at the rate of $326 a week for the workers' compensation benefits it would have been required to pay in the future were it not for the settlement. Thus $163,000 of the $700,000 settlement should be treated as the equivalent of "one full recovery" of all the workers' compensation benefits to which Snead was entitled.[2] We believe that the district court was correct in its finding that

> [h]ere, as a result of the third party settlement, Fireman's Fund was reimbursed for the benefits that it paid to Snead and was relieved from liability for any future

---

[2]Snead argues that he did not receive "one full recovery" of workers' compensation benefits because the Industrial Commission of Virginia (the "Commission") did not issue a "one full recovery" order. Under Va. Code Ann. § 65.2-701, an insurer and an employee may enter into a compromise of claim agreement, which is to be submitted to the Commission for its approval. "If approved, the agreement shall be binding . . . ." *Id.* An award of the Commission that is not contested "shall be conclusive and binding as to all questions of fact." *Id.* at § 65.2-706.

> benefit payments. Snead retained $410,000 from the third party settlement, and kept the workmen's compensation benefits previously paid to him by Fireman's Fund. Snead, therefore, received one full payment of workmen's compensation benefits, and he should not be allowed to recover twice for the same loss. *Sampson,* 863 F.2d at 110-111. To refuse UNUM the offset, and allow Snead to retain the workmen's compensation benefits would fly in the face of the policy American Pecco entered into with UNUM.

J.A. at 448. Furthermore, because UNUM did not take into account the workers' compensation benefits that Snead received during the period from September 26, 1989 through November 26, 1991 when UNUM paid the rehabilitation disability benefits, an overpayment of $37,799.42 resulted. UNUM is entitled to offset this sum against its monthly benefit liability until the overpayment is exhausted.

Accordingly, we affirm the judgment of the district court with respect to the amount of disability benefits to which Snead is entitled.

On August 28, 1989, the Commission entered an order ratifying the agreement between Fireman's Fund and Snead with respect to the tort settlement. That agreement stated:

> The outstanding award is terminated on the above date subject to approval by the Industrial Commission.
>
> * * *
>
> Mr. Snead received $410,000 from the third party carrier. No further compensation payments will be made until claimant has exhausted the net proceeds of the settlement at the rate of $326.00.

Snead argues that the order was a termination of benefits because it does not expressly state that he has received "one full recovery." We find this argument to lack merit. The agreement filed with the Commission reflects that Snead was paid a lump sum amount in lieu of receiving checks from Fireman's Fund on a weekly basis, which Snead would have had to reimburse from the proceeds of the tort settlement.

III.

Prior to trial, UNUM required Snead to submit proof of disability on a form entitled the Insured's Supplemental Statement, which was to be completed by a physician. On the issue of whether UNUM or Snead should pay for Snead's medical examinations, the district court found that the following provision in the Policy unambiguously stated that Snead must pay for any medical exams necessary to prove his continuing disability:

> When proof is received that an insured employee is totally disabled as the result of sickness or injury and requires the regular attendance of a legally qualified physician, the Insurance Company will pay a monthly benefit to the insured employee after completion of the elimination period. This monthly benefit will be paid as long as total disability continues provided that proof of continued total disability is submitted *at the insured employee's expense*, to the Insurance Company upon request. . . .

(Emphasis added). The district court failed, however, to take note of a separate provision in the Policy, which provides:

> PHYSICAL EXAMINATION: The Company at its own expense shall have the right and opportunity to examine the person of any individual whose injury or sickness is the basis of the claim when and as often as it may reasonably require during the pendency of the claim hereunder.

Snead argues that when the Physical Examination section is read together with the section relied on by the district court, there is some ambiguity as to who bears responsibility for payment of Snead's medical examinations. We agree. While written proof of disability is clearly a requirement of the Policy, it is not entirely clear that the nature of that

proof requires a physician's report. Snead asserts that when UNUM specifically requires submission of a physician's report, which it does in the Insured's Supplemental Statement form given to Snead, that it must be operating under the PHYSICAL EXAMINATION portion of the contract, which requires UNUM to pay for the exam. Because it seems that the district court did not consider this section in interpreting the contract, we remand this issue to the district court for further consideration.

IV.

The district court awarded attorneys' fees and costs to Snead under 29 U.S.C. § 1451(e) and 29 U.S.C. § 1123(g). UNUM correctly points out that § 1451(e) is inapplicable to Snead's action because it relates to withdrawal liability. However, we affirm the district court's fee award under ERISA § 502, 29 U.S.C. § 1132(g), which provides that a "court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The district court found that Snead had prevailed on his original claim that he was totally disabled, and applied this court's five-factor test first set forth in *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1217-18 (4th Cir. 1990), and rearticulated in *Quesinbery v. Life Ins. Co.*, 987 F.2d 1017, 1029 (4th Cir. 1993).[3] After reviewing the record in this case, we are

[3]The five factors are:

(1) degree of opposing parties' culpability or bad faith;

(2) ability of opposing parties to satisfy an award of attorneys' fees;

(3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;

(4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and

satisfied that the district court reached the correct result in its analysis of the *Quesinberry* factors, and we find no abuse of discretion in the court's award of attorneys' fees and costs to Snead. Accordingly, we adopt the reasoning of the district court on this point as articulated in its memorandum opinion. *James G. Snead v. UNUM Life Ins. Co. of America*, No. 92-542-A (E.D. Va. June 22, 1993).

V.

For the reasons set forth above, we affirm in part, but remand to the district court on the issue of responsibility for payment of medical examinations.

AFFIRMED IN PART; REMANDED IN PART

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(5) the relative merits of the parties' positions.

Quesinberry, 987 F.2d at 1029 (quoting *Reinking*, 910 F.2d at 1217-18).

It should be noted that while *Quesinberry* overruled *Reinking* on other grounds, *Quesinberry* carried forward the five factor test.

Appendix B

SNEAD v. UNUM LIFE INS. CO. OF AMERICA
Cite at 824 F.Supp. 69 (E.D.Va. 1993)

JAMES G. SNEAD, Plaintiff,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, Defendant.

Civ. A. No. 92-512-A.

United States District Court,
E.D. Virginia,
Alexandria Division.

June 22, 1993.

MEMORANDUM OPINION

CACHERIS, Chief Judge.

Plaintiff James G. Snead ("Snead") filed this action against Defendant UNUM Life Insurance Company of America ("UNUM") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et. seq. (1992). Snead claims entitlement to present and future disability benefits under the terms of group long-term disability Policy No. 14133 ("the policy") issued by UNUM to Snead's employer, American Pecco Corporation ("American Pecco"). UNUM seeks to offset workmen's compensation benefits paid to Snead by a third party against any benefit payments UNUM is required to make to Snead. Also, in order to monitor Snead's disability status, UNUM requests that a physician periodically examine Snead at Snead's expense. Finally, UNUM opposes Snead's request for counsel fees.

For reasons set forth below, the Court finds that UNUM is entitled to offset workmen's compensation benefits paid by a third party against UNUM's disability payments to Snead, that Snead must periodically submit to a physical exam at his own expense, reporting the exam results to UNUM, and that Snead is entitled to recover his counsel fees.

I. Findings of Fact

After reviewing the pleadings, the evidence, arguments of counsel, and authorities, the Court finds the following facts:

1. Plaintiff James G. Snead is a resident and citizen of the Commonwealth of Virginia.

2. Defendant. UNUM Life Insurance Company of America is a life insurance company organized under the laws of Maine with its principle place of business in Portland, Maine. Snead's employer, American Pecco, purchased an employee welfare plan, from UNUM, to provide long-term disability benefits for its eligible employees from UNUM (Policy No. 14133). The policy is an employee welfare benefit plan governed by ERISA, 29 U.S.C. § 1001 *et seq.* (1992).

3. On June 27, 1987, Plaintiff was working as a serviceman on a personnel hoist to realign rollers. The hoist operator took the control box onto the top of the cage. Snead was injured when the operator laid down the controls, and a starting mechanism was activated. The starting mechanism caused the hoist to move upwards crushing Snead's arm between rollers. (Def.Ex. 34.)

4. Plaintiff has permanently lost all occupational use of his right hand and arm.

5. Dr. Baugher, an orthopedic surgeon, wrote UNUM on May 4, 1989, "It is fairly clear that based on his education,

etc. that Mr. Snead is totally disabled." (Pl.Ex. 9.) On September 24, 1991, Dr. Baugher wrote UNUM, "Mr. Snead, certainly, is unable to perform his previous job with the damaged hand and has a significant permanent impairment" (Pl.Ex. 11.)

6. Plaintiff submitted to an independent medical exam performed by Dr. Lee Voulters, a neurologist, on June 16, 1989. Dr. Voulters found the following:

> Neurological examination now shows evidence of significant wasting, weakness, and numbness involving the right hand and forearm. This gentleman has clearly suffered extensive nerve injury involving the median and ulnar nerves of the right arm. There is likely some radial nerve involvement, although there has been transposition of the ligaments making it difficult to assess this. In any event, this gentleman has been left with a right hand with very limited usefulness.

(Pl.Ex. 13.)

7. Dr. E. Davis Martin, Jr., a vocational expert, found, after examining Snead's claim, that he is not able to perform his usual occupation because of his physical limitations. He also found that Snead did not have any transferable skills due to the specialized nature of his previous employment. (Pl.Ex. 41.)

8. Snead filed a claim for workmen's compensation benefits with the Department of Workmen's Compensation Industrial Commission of Virginia on July 1, 1987. (Def.Ex. 34 at 22.)

9. Beginning June 28, 1987, Fireman's Fund Insurance Company paid workmen's compensation benefits to Snead at a rate of $326 per week, based on Snead's average wage of $732 a week.

10. Snead filed a third party action against HCB Contractors for injuries sustained as a result of his accident. *Snead v. HCB Contractors, Inc. et al.*, No. K87-2022 (D.Md.1987). (Def.Exs. 7 and 8).

11. In August 1989, Snead settled with HCB Contractors and Random Construction Company for $700,000.00. After payment of medical expenses, fees and costs, Snead netted $410,000.00 from the settlement. (Def.Ex. 6.) One of the costs that the settlement funds paid for was a $50,000.00 workmen's compensation lien. *Id.* Snead also executed releases to Random Construction Company, Aetna Casualty Company, and HCB Contractors, Inc. (Def.Ex. 7 and 8.)

12. Fireman's Fund Insurance Company and Snead filed an agreed statement of facts with the Workmen's Compensation Industrial Commission of Virginia on September 25, 1989. The statement of facts indicates weekly compensation payments of $326 for the period of June 28, 1987 through August 31, 1989, totalling $39,236.85. The agreed statement also notes that

> Mr. Snead received $410,000.00 from the third party carrier. No further compensation payments will be made until claimant has exhausted the net proceeds of the settlement at the rate of $326.00.
>
> The insured and claimant agree that the insured shall continue to pay all related medicals for five years.

(Def.Ex. 31 at 12.)

13. Snead applied to UNUM for disability benefits on or about September 10, 1987. (Def.Ex. 1 at 285.)

14. On November 10, 1987, UNUM approved Snead's claim for long-term disability benefits. UNUM subsequently paid long-term disability benefits to Snead from September 26, 1987 to September 26, 1989 (twenty-four (24)

months), for a total payment of $32,081.45. (Def.Ex. 1 at 4.) For the period of September 26, 1989 to November 26, 1991 (twenty-six (26) months), UNUM paid long-term disability benefits to Snead under the rehabilitative employment provisions of the policy. Beginning June 17, 1991 through November 26, 1991, UNUM paid benefits to Snead under the policy's reservation of rights provision, because it was investigating Plaintiff's continued entitlement to benefits. (Def.Ex. 1 at 3, 4, 97, 101.)

17. By letter dated November 27, 1991, UNUM informed Snead that no further benefits were payable under the policy, because review of his file indicated that he was no longer totally disabled. The letter also indicated that UNUM was closing his file. (Def.Ex. 1 at 21.)

18. On December 5, 1991, Walter Schey, Esq. counsel for Snead, wrote UNUM to request a review of the November 27, 1991 denial of benefits. (Def.Ex. 1 at 16.)

19. After exhausting his administrative remedies, Snead filed this action pursuant to the ERISA 29 U.S.C. § 1132(a)(I)(B) and § 1451 (1992), on April 17, 1992.

20. UNUM filed a Motion for Summary Judgment on July 29, 1992. On August 28, 1992, the Court denied UNUM's motion and remanded the matter to the UNUM Plan Administrator for full and fair review of Snead's disability claim. The Court set a status hearing for September 25, 1992. At the status hearing, UNUM conceded that Snead was totally disabled.

21. This matter came to trial on October 27 and 28, 1992. At trial, two workmen's compensation law experts, John C. Duncan, testifying for UNUM, and Joseph Trapeni, testifying for Snead, agreed that, before ruling on Snead's claim, the Virginia Workmen's Compensation Commission should have requested a medical report, a new statement of

facts, and letters from the lawyers involved in the third party settlement explaining the details of the settlement.

23. The Virginia Workers' Compensation Commission has the power to terminate or suspend awards where there are no payments, or to leave the award open where there are payments. (Testimony of Trapeni.) The Virginia Workers' Compensation Commission should have determined "one full recovery" for Snead and discharged Fireman's Fund Insurance Company from further liability to Snead. (Testimony of Duncan.)

II. Standard of Review

The standard of review for a denial of benefits determination is set forth in *Firestone Tire & Rubber Co. v. Brach,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The Fourth Circuit recently stated:

> [t]he Supreme Court decided that a district court should review *de novo* a plan administrator's denial of benefits under § 1132(a)(1)(B) of ERISA, unless the benefit plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of the plan."

Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1021 (1993) quoting *Firestone,* 489 U.S. at 115, 109 S.Ct. at 956, 103 L.Ed.2d at 96.

On November 27, 1991, UNUM informed Snead that it was denying further benefits to him because review of his file indicated that he was no longer totally disabled. The policy in question here does not expressly delegate discretionary authority to a plan administrator or a fiduciary. Accordingly, the Court will conduct a *de noen* review of UNUM's decision to deny benefits to Snead, and UNUM's decision to offset third party workmen's compensation bene-

fit payments to Snead against any disability payments UNUM must make to Snead.

III. Discussion

[1] As noted in the findings of fact, Fireman's Fund Insurance Company paid Snead $326 on a weekly basis in workmen's compensation benefits beginning on June 28, 1987 (the date of the accident) until August 31, 1989.[1] On August 14, 1989, Snead settled his lawsuit against HCB Contractors, Inc. and Random Construction for $700,000.00. Fireman's Fund was reimbursed for the benefits it paid to Snead from the proceeds of this third-party settlement. After paying attorney's fees and other costs, Snead retained $410,000.00 from the settlement. Snead also retained the workmen's compensation benefits Fireman's Fund previously paid to him. On November 27, 1991, approximately two years later, UNUM denied payment of any future disability benefits to Snead. After UNUM's denial of benefits, Snead exhausted his administrative remedies and filed this action. As previously stated, this Court remanded the matter to the UNUM plan administrator. After the remand, UNUM conceded Snead's disability. UNUM now argues that the workmen's compensation payments received by Snead should be applied to reduce the monthly benefit that UNUM must pay to Snead. To support its argument, UNUM prefers the following policy terms:

> MONTHLY BENEFIT REDUCTION: If the Insured Employee is entitled to other income benefits, as defined below, for the same period of disability for which a Monthly Benefit is payable in accordance with

---

[1] Fireman's Fund paid Snead for approximately one hundred and twenty (120) weeks. Under Virginia law, Fireman's Fund's obligations to pay benefits to Snead ceases after five hundred (500) weeks. Va.Code § 65.2-500(d) (Michie 1991).

> the terms of this Policy, then the amount of such Monthly Benefit which is payable hereunder shall be reduced by the amount of these other income benefits.
>
> Other income benefits, referred to above, include:
>
> (1) any amount payable under any Workmen's Compensation Law, Occupational Disease Law, or any other legislation of similar purpose. . . .

(Pl.Ex. 1 at 28.)

According to UNUM's interpretation of the above language. UNUM should have reduced benefit payments it made to Snead from September 26, 1987 to September 26, 1989 by the amount of money that Fireman's Fund paid to Snead during that same time period. UNUM, therefore, seeks to offset the amount of workmen's compensation benefits paid to Snead by Fireman's Fund against disability benefits UNUM must pay to Snead. UNUM further asserts that it is entitled to this offset for five hundred (500) weeks, which is the maximum allowable period for workmen's compensation under Virginia law. Va.Code § 65.2-500(D) (Michie 1991).

Snead, on the other hand, argues that he is owed the full amount of his disability benefits, and that UNUM cannot reduce benefit payments to him by offsetting previous workmen's compensation benefits.

Only one federal appeals court has addressed the issue at hand. *Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108 (1st Cir. 1983). In *Sampson*, the worker suffered an injury which disabled him for approximately three years. During the period of his disability, Sampson was paid both disability benefits by the defendant Mutual Benefit Life Insurance Company (Mutual Benefit) and workmen's compensation through his employer's insurance carrier. In order to offset the workmen's compensation benefits Sampson received for his loss of time, Mutual Benefit withheld $19,117.50 from

its disability payments to Sampson. The district court approved of Mutual Benefit's decision to offset, and granted summary judgment to Mutual Benefit. In affirming the district court, the First Circuit noted that

> to allow Sampson to recover the loss-of-time offset from Mutual would violate the principle underlying both the Mutual policy's offset provision and the reimbursement provisions of the Massachusetts Workers' Compensation Law, for it allows Sampson to recover twice for the same loss.

Sampson, 861 F.2d at 110-11; see also Neson v. Brown and Root USA, Inc., 790 F.Supp. 123, 129 (M.D.I. 1992) (*Sampson* confirms the general rule that it is permissible for a disability insurer to offset worker's compensation benefits under ERISA only if the policy provides for such an offset).

Snead contends that the *Sampson* result is illogical, and urges this Court not to follow it. While *Sampson* is merely persuasive authority, this Court is inclined to follow its direction.

In its decision in *Sampson*, the First Circuit focused on the language of Mutual's policy offset provision. Here, UNUM presents its policy's offset provision as its rationale for reducing Snead's monthly benefit. The relevant language of the policy offset provision reads:

> If the Insured Employee is entitled to other income benefits . . . for the same period of disability for which a Monthly Benefit is payable . . . then, the amount of such Monthly Benefit which is payable hereunder shall be reduced by the amount of these other income benefits.

The Court finds, as did the court in *Sampson*, that the plain language of the policy provision permits the insurance company to offset disability benefits against workmen's compensation benefits previously paid to the disabled employee.

Thus, UNUM is entitled to offset workmen's compensation benefits paid to Snead by Fireman's Fund against disability payments UNUM must pay to Snead.

Snead relies on *Sheris v. Travelers Ins. Co.*, 491 F.2d 603 (4th Cir.), *cert. denied*, 419 U.S. 811, 95 S.Ct 51, 42 L.Ed.2d 56 (1974) for the proposition that when an employee sues the person responsible for his work-related injury, the employer is entitled to reimbursement for compensation already paid and to be discharged from liability for future payments to the extent the judgment against the wrongdoer is sufficient to satisfy the compensation award. The balance may be retained by the employee, and the employer's workmen's compensation carrier stands in the shoes of the employer. *Id.* at 605. *Sheris* is factually inapposite to this dispute because the primary issue therein is the apportionment of attorney's fees between a workmen's compensation carrier and the administratrix of an estate who recovered for the wrongful death of an employee. *Id.* at 605. The *Sheris* court's conclusion, however, supports UNUM's not Snead's, position because it sanctions reimbursement of the workmen's compensation carrier.

Snead further argues that if UNUM is permitted to offset, he will have received no workmen's compensation recovery. He reasons that the third party settlement, from which Fireman's Fund was reimbursed, failed to provide specific funds for reimbursing the workmen's compensation insurer. The Court finds this argument unpersuasive. Here, as a result of the third party settlement, Fireman's Fund was reimbursed for the benefits that it paid to Snead and was relieved from liability for any future benefit payments. Snead retained $410,000 from the third party settlement, and kept the workmen's compensation benefits previously paid to him by Fireman's Fund. Snead, therefore, received one full payment of workmen's compensation benefits, and he should not be allowed to recover twice for the same loss.

Sampson, 863 F.2d at 110-111. To refuse UNUM the offset, and allow Snead to retain the workmen's compensation benefits would fly in the face of the policy American Pecco entered into with UNUM.

IV. Future Medical Examinations

[2] The next question before the Court is whether UNUM or Snead should pay for Snead's future medical examinations. Policy No. 14133 states as follows:

> When proof is received that an insured employee is totally disabled as the result of sickness or injury and requires the regular attendance of a legally qualified physician, the Insurance Company will pay a monthly benefit to the insured employee after completion of the elimination period. This monthly benefit will be paid as long as total disability continues provided that proof of continued total disability is submitted *at the insured employee's expense,* to the Insurance Company upon request. . . .

(Pl.Ex. I at 12) (emphasis added).

"Where the terms of [a] contract are not ambiguous, the express language of the contract controls in determining its meaning and not what either party thought the agreement to be." *S.C. Nat. Bank v. Atlantic States Bankcard Assoc.,* 896 F.2d 1421, 1426 (4th Cir. 1990). The Court finds that the terms of the contract are not ambiguous. Although Snead argues that any future medical exams should be at UNUM's expense, the contract at issue states that UNUM will pay a monthly benefit as long as, "proof of continued total disability is submitted *at the insured employees' expense.*" (Pl.Ex. 1 at 12) (emphasis added). The clear meaning expressed by the contract terms dictate that Snead must pay for any future medical exams. Accordingly, the Court finds

that all future medical exams related to monitoring Snead's disability status shall be at Snead's expense.

V. Attorney's Fees

[3] Snead seeks a recover his attorney's fees and costs in connection with the prosecution of this action. UNUM opposes this request.

Snead brought this action under 29 U.S.C. § 1132 and § 1451. Subsection (e) of § 1451 provides:

> In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees to the prevailing party.

The Court finds that Snead is totally disabled within the meaning of the policy, and is therefore the prevailing party under § 145(e).[2] In *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1217 (4th Cir.1990), the Fourth Circuit adopted a five-factor test to guide the district court's exercise of discretion in awarding attorneys' fees under ERISA. *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028 (1993). The five factors are:

> (1) degree of opposing parties' culpability or bad faith;
>
> (2) ability of opposing parties to satisfy an award of attorneys' fees;

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[2]ERISA also provides that "the court in its discretion may allow a reasonable attorney's fee.... ERISA § 502(g), 29 U.S.C. § 1132(g). ERISA therefore places the determination of whether attorneys' fees should be awarded in an ERISA action completely within the discretion of the district court. *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028 (1993).

(3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances;

(4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and

(5) the relative merits of the parties' positions.

Id. (quoting *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1217 (4th Cir. 1990) quoting *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1256 (5th Cir. 1980)). This approach is not a strict test, in fact it is not necessary that all factors weigh in favor of granting attorneys' fees. *Quesinberry*, 987 F.2d at 1028. The Fourth Circuit emphasized that ERISA vests the district courts with discretion in this area and noted that these factors provide a basis for reviewing whether the district court's decision to award attorneys' fees was an abuse of discretion. *Id.* at 1029.

The Court will apply each *Reinking/Quesinberry* factor, in turn, to Snead's request for attorneys' fees. The Court finds that the "bad faith factor" weighs heavily in favor of awarding attorneys' fees to Snead. UNUM boldly suggests that Snead's conduct in this case borders on bad faith, and reminds the Court that bad faith behavior precludes a party from obtaining counsel fees and costs. The Court finds that UNUM's conduct, however, not Snead's, borders on bad faith. For example, Snead filed his application for benefits with UNUM in September, 1987, promptly providing UNUM with all necessary information to process his claim, but UNUM resisted his application. UNUM, in fact, delayed processing Snead's claim until it was in receipt of several letters from Walter Schey, Esq., counsel for Snead, threatening a lawsuit. Furthermore, UNUM's file contains a

claim referral dated July 5, 1989, revealing the following comment:

> Bryan, CLMT's experience is a lot of the same which would prevent him from working — You will pay to at least 24 mos — refer to Ann Marie for a transferable skills assessment — no need to refer to Kaye — We need to see if we can deny 24 mos. Thorn 7/11/89.

(Pl.Ex. 17.) Despite this July, 1989 claim referral note, UNUM did not conclude that Snead was totally disabled until September 1, 1992, after this Court remanded Snead's application to the Plan Administrator. The UNUM file also contains information indicating that a transferable skills analysis was performed on Snead in August, 1989, and it concluded that Snead was not eligible for other gainful employment.

As to the second factor; ability to satisfy an award, UNUM has the financial ability to satisfy an award of attorney's fees to Snead. The "deterrence" factor weighs in favor awarding attorney's fees to Snead, because such an award may discourage other insurance companies from treating claimants in a similar discourteous manner.

The fourth factor the Court must apply is whether Snead sought to benefit all plan participants or resolve a significant ERISA question. This litigation centered around a significant ERISA question, whether an insurance company is entitled to offset workmen's compensation benefits against disability payments, which only one federal appeals court has previously addressed. While Snead may not have intended to directly benefit all plan participants, resolution of this dispute may benefit other plan participants in the future. As to the fifth factor, the relative merits of the parties' positions, Snead is the prevailing party under § 1451(e), yet UNUM is entitled to offset its disability payments by the

amount of workmen's compensation benefits already paid to Snead.

After examining the *Reinking/Quesinberry* factors, the Court finds that the first four factors weigh in favor of awarding counsel fees to Snead. Accordingly, Snead is entitled to counsel fees under 29 U.S.C. § 1451(e).

VI. Conclusions of Law

The Court makes the following conclusions of law:

1. that this Court has jurisdiction pursuant to ERISA, 29 U.S.C. § 1001 (1992), *et seq.;*

2. that UNUM properly calculated Plaintiff's monthly disability benefits;

3. that Plaintiff is not entitled to recover any workmen's compensation reductions taken by UNUM. UNUM has overpaid Plaintiff $37,799.42 for the period from September 26, 1989 through November 26, 1991;

4. that UNUM may offset this overpayment against present and future monthly benefit payments to Snead;

5. that Plaintiff's monthly total disability entitlement is $1,318.78. That figure includes an appropriate reduction for workmen's compensation benefits already paid to Snead. This reduction shall continue until five hundred (500) weeks from the date of the injury;

6. that in order to remain eligible for benefits, Plaintiff must periodically submit proof of disability to UNUM at his own expense;

7. that Snead is entitled to recover his counsel fees and costs in connection with this action.

An appropriate order shall issue.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby ORDERED:

(1) that judgment is hereby entered in favor of UNUM Life Insurance Company of America against the Plaintiff James G. Snead. Plaintiff's complaint is DISMISSED with prejudice;

(2) that Plaintiff shall submit his application for counsel fees and costs within fifteen (15) days of the date of entry of this Order;

(3) that Defendant UNUM Life Insurance Company of America shall submit its opposition with (30) days of the date of entry of this Order.

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Appendix C

FILED
January 10, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES G. SNEAD, *Plaintiff-Appellant,* v. UNUM LIFE INSURANCE COMPANY OF AMERICA, *Defendant-Appellee.*	No. 93-1857 CA-92-542-A

JAMES G. SNEAD, *Plaintiff-Appellee,* v. UNUM LIFE INSURANCE COMPANY OF AMERICA, *Defendant-Appellant.*	No. 93-1944 CA-92-542-A

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Sprouse voted to grant panel rehearing. Judge Ervin and Judge Harvey voted to deny.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Sprouse voted to rehear the case in banc, and Judges Ervin, Russell, Hall,

Murnaghan, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Michael and Motz voted against rehearing in banc.

The Court denies the petition for hearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin for the Court.

For the Court,

/s/ Bert M. Montague

CLERK

Appendix D

I.C. File No.: 130-26-39

Processed Date: OCT-19-1989 Processed By: FKP

Date of Accident: JUN-27-1987 Wage: $732

Outstanding Award? NO

Comp Type	Comp Rate	Begin Date	End Date	Weeks Due	Comp Paid	Comp Due
TT	$326.00	JUN-28-87	AUG-31-89	113.50	$38,235.58	$37,069.72
CL	$326.00	JUN-28-87	AUG-31-89	100.10	$ 1,001.27	$ 1,001.27
Over or Under=>					$1,165.86	Totals=> $39,236.85	$38,070.99

Section 65.1-99 AUG-31-1991

Specific AUG-31-1992

Total Paid On File: $39,236.85

PINK SHEET

PINK SHEET